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Supreme Court of the United States

OCTOBER TERM, 1943
No. 105

EASTERN-CENTRAL MOTOR CARRIERS ASSOCIATION, MIDDLE ATLANTIC STATES MOTOR CARRIER CONFERENCE, INC., and CENTRAL STATES MOTOR FREIGHT BUREAU, INC.,

Appellants,

vs.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

BRIEF IN BEHALF OF APPELLANTS

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There is here involved the validity of an important motor carrier rate-making order of the Interstate Commerce Commission which was assailed by the main and intervening appellants in the United States District Court for the Southern District of New York (R. 1). That court (one Circuit and two District Judges participating) having dismissed the suit (R. 41) the case is here on direct appeal (R. 48). Probable jurisdiction has been noted by this court (R. 71), and at the same time it laid aside the Government's motion to affirm.

The involved Commission order was made by its Division 3 (R. 9). The full Commission membership reviewed it and by vote of seven to three left that order undisturbed (R. 21). The administrative remedy was thereby exhausted.

The opinion of the court below (R. 41) and its findings and conclusions (R. 39) were not directly responsive to the

particular contentions upon which appellants rely to invalidate the Commission's order. That court's opinion is mostly a mere restatement of the Commission's majority opinion to which was added emphasis upon the acknowledged fact that the Interstate Commerce Commission is an expert administrative tribunal. As the matter before this court is the validity of the Commission's own action the opinion of the court below will not here again be referred to.

I

FACTS

(a) Proceedings before the Commission.

Bearing effective dates which the record and the opinion describe the appellant Eastern-Central Motor Carriers Association (under powers of attorney in behalf and as the agent of its common carrier trucking membership) filed with the Interstate Commerce Commission tariff supplements in some respects changing the then-existing interstate motor carrier rates on linoleum floor covering from northeastern manufacturing localities to mid-western destinations. Before the effective dates thereof the Commission, by one of its divisions, entered upon an investigation of the lawfulness of the proposed changes in rates; and pending the conduct of that investigation the operation of the new tariff schedules was suspended. The final order of Division 3, after hearing, determined the suspended schedules would be unlawful in the limited and particular respect therein set forth, and their cancellation was required (R. 9). Thereafter the full Commission membership reopened the case for review of that order of its Division 3; but it did not do so before the effective date of the order which therefore had to be complied with under the duress of its terms. While writing a new opinion and changing somewhat the elements of decision the full Commission majority

left the order of Division 3 in effect (R. 21). Commencement of this action for judicial review then followed (R. 1). As the involved order, although complied with, is a continuing one the restraint which it imposes is here sought to be removed.

(b) Rates Involved.

In the suspended schedules so required by order to be cancelled the involved linoleum transportation charges were these: rates per 100 pounds at 45 per cent of first class would be charged when the quantity tendered to the motor carriers in one day for shipment on one bill of lading by one consignor to one consignee amounts to not less than 30,000 pounds. When the quantity so tendered might be less than 30,000 pounds but more than 20,000 pounds rates per 100 pounds at 47.5 per cent of first class would be charged. On the smaller weight shipments consisting of less than 20,000 pounds rates per 100 pounds at 70 per cent of first class would be charged (R. 21).*

(c) Findings of the Commission.

There is a paucity of true and clear "findings" in the sense of factual determinations. About all that can be gathered of that nature from the reports are these:

(a) The only protest against the new motor carrier rates came from a group of western railroads who, however, in the course of the public hearing withdrew their protest and retired from the case (R. 22). No shippers sought suspension of the operation of the new tariff schedules and none submitted evidence or took any part in the public hearing. When the full Commission reviewed the case it allowed a representative of linoleum manufacturers (not parties to

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* An accompanying tariff provision prevented the charging of more for a smaller weight shipment at the higher rate per 100 pounds than otherwise would be charged for a greater weight shipment at the lower rate per 100 pounds.

the proceeding) the privilege of participating in the oral argument. He "questioned the propriety" of the involved rates, contending they would be "unsound". He "requested" the action of Division 3 be affirmed (R. 27).

(b) The legal load-carrying capacity of the individual truck vehicles would enable about 22,000 pounds of linoleum floor covering to be transported in one vehicle. That is the consequence of state "trade barrier" laws. The full Commission said: "This maximum carrying capacity is the amount which can be carried under the laws of the state through which the trucks move" (R. 29). Therefore, as to shipments weighing 30,000 pounds, there would be an overflow of about 8,000 pounds into a second vehicle. The remainder of space in the second truck vehicle would, however, be available for the loading of other shipments of the same or a different kind of freight from the same or different consignors to the same or different consignees either at the same or different localities. The Commission added: "But it is doubtful whether less than truckload shipments from Boston to Dodge City or between intermediate points always would be available" (R. 29).

(c) The involved motor carriers did not offer evidence designed to establish that their operating costs per 100 pounds of linoleum floor covering would be lower on 30,000-pound shipments than on those weighing 20,000 or 22,000 pounds.

(d) The purpose of the motor carrier 45 per cent basis of rates, to be governed by a minimum weight of 30,000 pounds, was to make available to the shipping public (at its own choice) rates on quantity shipments by motor carriage as low as the railroad carload rates on linoleum, which were then also 45 per cent of first class and which were also governed by a minimum weight of 30,000 pounds (R. 30).

Appellants do not consider that any "findings" were made by the Commission other than those just enumerated.

if they are to be treated as findings at all. The record of the public hearing before the Commission is very short and has been brought up to this court as a part of the record before it in this proceeding (R. 49).

(d) Conclusions of the Commission.

By way of ultimate conclusion (wrongly described as a "finding") Division 3 determined that neither the suspended rates per 100 pounds of 45 and 47.5 per cent of first class would be unjust or unreasonable (because too low or too high) but that it would be unjust and unreasonable to attach to the availability of either one of them the condition that more than a minimum weight of 20,000 pounds would be required for each single shipment.(*)

The evident intent, and of course the practical effect of that order, would therefore confine the motor carriers to publication of a single "quantity rate", whether 45 or 47.5 per cent, which would have to be governed by the requirement of a minimum shipping weight of no more than may be loaded in a single truck vehicle, due to one or more state barrier laws along the routes of movement. A minimum weight to any extent greater than may be loaded in single truck vehicles "ordinarily used" was determined to be inherently unlawful even though 30,000 pounds is the accepted trade unit of quantity purchase and sale of these commodi-

(*) This was the language used: "We find that the proposed schedules in these proceedings are just and reasonable and otherwise lawful except to the extent that they propose to establish a minimum of 30,000 pounds; that the proposed minimum of 30,000 pounds is unjust and unreasonable; and that a minimum of 20,000 pounds would be just and reasonable.

"The proposed schedules, to the extent found not just and reasonable, will be ordered canceled without prejudice to the establishment by respondents of truckload rates on linoleum, minimum 20,000 pounds, which are not less than 45 per cent of the corresponding first-class rates". Page 13.

ties, even though it is the railroad minimum weight, and even though the overflow into a second truck vehicle would leave ample space for other shipments of other rate-paying shipments of the same or other kinds of freight.

In its decision on review the full Commission "affirmed" the prior "findings" of Division 3 as to the "unreasonableness" of so attaching the requirement of a minimum weight of 30,000 pounds to whatever might be the "quantity rate" offered by the motor carriers. But, unlike Division 3, the full Commission added by way of further conclusion (again wrongly called "finding") that the proposed 45 per cent rates, minimum 30,000 pounds, would give an unjust advantage to shippers who might "tender" 30,000 pound lots and be unjustly discriminatory against shippers who might "tender" 20,000 pound lots and who would therefore be subject to the 47.5 per cent basis of rates. The terms in which the full Commission couched those ultimate conclusions appear in the footnote.*

The clear object of both Division 3 and the full Commission majority therefore was to disallow to the motor carriers the right to attach to any of their quantity rates the requirement that the minimum weight of single shipments necessary to avail the lowest should be 30,000 pounds (requiring overflow into a second vehicle) and to compel the prescribed minimum weight not to exceed 20,000 pounds despite the trade unit of purchase and sale being 30,000. As there could not be two different levels of tariff rates between the same locality each based upon a minimum shipping weight

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* "Upon oral argument, we affirm the prior findings of division 3 that the proposed rates 45 and 47.5 per cent of first class are not unjust or unreasonable except to the extent that the proposed rates, 45 per cent of first class, are subject to a minimum of 30,000 pounds.

"We further find that the proposed rates, minimum 30,000 pounds, would give an unjust advantage to shippers of 30,000-pound lots and be unjustly discriminatory to shippers of 20,000-pound lots".

of 20,000 pounds the intent and result would necessarily be the required maintenance of only one rate level on quantity shipments, either at 45 or a somewhat higher percentage of first class, and to govern it only by the smaller 20,000-pound minimum shipping weight. That same result would come about under either the conclusion of "unreasonableness" or of "discrimination", were the order to be valid.

There would then be left to the motor carriers only the choice of making their 45 per cent rates available on a smaller minimum weight than the competitive railroad rates would require, or else to charge substantially more than the railroad rates per 100 pounds because of the smaller minimum weight to which the motor carrier rates would apply.

To exceed so considerably the railroad rates per 100 pounds would deny to motor carriers and the shipping public the privilege of competition that is fair. Yet for motor carriers to offer as low rates per 100 pounds as the railroads do, but to make them available on smaller-weight shipments than the railroad competition requires, would be to allow the competition only on terms and conditions not called for by the competition itself.

II

ASSIGNMENT OF ERRORS OF LAW COMMITTED BY THE COMMISSION AND THE COURT BELOW, AND SUMMARY OF ARGUMENT OF APPELLANTS.

The validity of this drastic action of the Commission (upheld by the court below) is assailed by appellant motor carriers on the following principal grounds embodied in the assignment of errors (R. 45):

1. The Commission's ultimate conclusions of illegality of the proposed rates are acknowledged in terms both by Division 3 and the full Commission majority to rest only

upon a Commission "policy". Other than the declared "policy" of the Commission in respect to these and other rates of similar kind no other reasons or "findings" were made by the Commission as a foundation for its conclusions. As the Commission possesses only authority to administer the provisions of the statute entrusted to it and it neither has been nor could be constitutionally endowed with legislative power to regulate motor carriers by a "policy" of its own creation, the order shows invalidity upon its face. (*Southern Pac. Co.* v. *I. C. C.*, 219 U. S. 433; *I. C. C.* v *U. P. R. Co.*, 222 U. S. 541, 554; *U. S.* v. *Ill. Cent. R. Co.*, 263 U. S. 515, 525.) One of the three dissenters (Commissioner Lee) properly spoke of the order as "arbitrary".

2. As both the 45 and 47.5 percentages of first class rate levels, dependent only upon the shipping weights tendered, would be openly and freely available under the tariffs to any shipper at any locality at his mere election of individual shipping weight, there would not and could not be in fact or in law any "discrimination" between shippers by the carrier offer of the choice. Nothing would be granted to some shippers and denied to others. Similar graded rates, dependent upon varying shipping weights, were before the Commission and this court and not deemed discriminatory in *Mississippi Valley Barge Case*, 292 U. S. 282. The Commission made no finding whatsoever that the lowest of the rates to be available under the tariffs only upon individual shipments of not less than 30,000 pounds would in practical economics be usable only by a restricted class or relatively few shippers or that there is lacking an equal opportunity of any shipper to take the choice of rates and shipping weights. On the contrary it is acknowledged by the Commission that shipments of 30,000 pounds of linoleum constitute the ordinary trade unit of quantity sales of these commodities as indicated by the fact that the railroad freight carload rates on the same commodities between the same localities are governed by a minimum weight of 30,000 pounds. In respect to the issue of discrimination the case is therefore

governed by *Penn Refining Co.* v. *N. Y. R. R. Co.*, 208 U. S. 208, 221 and *I. C. C.* v. *Diffenbaugh*, 222 U. S. 42. It is distinguishable from *U. S.* v. *Chicago Heights*, 310 U. S. 344 and *B. & O.* v. *U. S.*, 305 U. S. 507.

3. The involved rates of 45 and 47.5 per cent per 100 pounds were determined not unreasonably low or unreasonably high. There was no determination that the carriers' earnings, on 30,000-pound shipments at 45 per cent of first class, would be too low or too high. No injury to any shipper was found to result should an overflow into a second truck vehicle occur on shipments of 30,000 pounds. No prohibitions against carrier acceptance of individual shipments weighing 30,000 pounds or even more was imposed. The ultimate conclusion that it would be "unreasonable" to govern any of the motor carrier rates by a required minimum shipping weight of 30,000 pounds was purely arbitrary and was arrived at only as a matter of "policy". No "multiple truck rates" are involved. The decision ignores completely the well-established 30,000 pound trade unit of purchase and sale. It rests upon nothing more than the Commission's assertion that (due to state laws) since about 22,000 pounds of this floor covering is all that may be physically loaded by the motor carriers in single motor truck vehicles "ordinarily used" it is *therefore* unlawful for motor carriers to impose a minimum weight requirement in excess (although small) of the legal load capacity of individual motor trucks so "ordinarily used", unless it should be shown that the carrier operating expense *per 100 pounds* is lower when the quantity shipped requires the partial use of a second vehicle than when only one vehicle is needed for the load. The Commission did not point to any salient facts or provision of the statute upon which that arbitrary conclusion of mere "policy" of its own is based.

4. As revealed by the Commission's reports the proposed rate level of 45 per cent of first class on quantity shipments of 30,000 pounds expressed the endeavor of

motor carriers to make available to shippers by highway the same rates per 100 pounds as the railroads at that time made on their carload shipments and which railroad carload rates are governed by the same requirement of 30,000 pounds as the minimum shipping weight.* The asserted right of motor carriers thus to effectuate a close competitive relationship between the motor and railroad rates was denied by the Commission on the extreme assumption that this court in *U. S.* v. *Ill. Cent. R. Co.*, 263 U. S. 515, allowed to it the authority to recognize or not to recognize competition virtually as it may please. No reason here was assigned or any facts found by the Commission why, unlike *Barringer & Co.* v. *U. S.*, No. 520 October Term 1942, the important element of competition between motor and rail carriers should have been so arbitrarily disregarded by the Commission. The Congressional policy favors fair competition in the public interest; it only prevents "destructive" competition.

5. There was no "finding" or "conclusion" of the Commission that inefficient or uneconomical motor carrier operation would result from the involved rates. At the most there was a loose expression of "doubt", not based upon anything contained in the record before it, that there would always be available sufficient less than truckload miscellaneous freight shipments to fill out the available space in a second truck vehicle from Boston to Dodge City or intermediate places. But the Commission must have lacked confidence in the significance of that "doubt" because it avoided any determination that the involved motor carrier rates, under either the minimum weight of 30,000 or 20,000 pounds, would produce earnings too low or too high in the way the business is ordinarily handled. Certainly the Commission's order is not, as such, directed to

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*After the new motor carrier tariffs were filed on the basis of 45 per cent for 30,000 pounds the railroads, for a while, established 42.5 per cent of 1st class.

any change of the carriers' operating practices, even if the statute would allow it, which is doubtful. The order does not forbid acceptance of shipments weighing 30,000 or even a greater number of pounds, regardless of the amount of truck equipment needed for their transportation. If to any extent whatsoever the Commission meant to hint at some remote chance of inefficiency and lack of economy its findings in that regard are altogether too nebulous to serve as a basis for a valid order.

6. The clear implications of the Commission's action in this and subsequent cases like it are that it is attempting virtually to *allocate* commodity freight traffic in this country as between motor and rail transportation so as to exclude motor carriers from participating in quantity freight shipments (within the usual limits of purchase and sale) except either (1) at higher than railroad rates per 100 pounds in consideration of the prescribed smaller minimum weight requirements or (2) to permit participation in such quantity shipments at the equal of railroad carload rates per 100 pounds only upon the condition of making them available to shippers at a lower minimum weight than the competitive railroad rates would call for. This endeavor of the Commission so to mould the competitive rate relationship of motor and rail carriers on quantity shipments of ordinary trade units of purchase and sale is wholly beyond its authority under the statute which forbids only "destructive" competition. The Commission was not given by Congress an unconstitutional power of arbitrary economic dictatorship over transportation. So long as the motor carrier rates are not otherwise unlawful the declared Congressional policy is to encourage freedom of competitive effort in transportation so that the shipping public may have the advantage. The Commission may not lawfully deny the privilege of fair competition; it may not allow the privilege of competition only under terms and conditions which would make it unfair and destructive.

III

ARGUMENT

A. The Commission's order is invalid because the conclusion of illegality was based only upon its own declared "policy".

It is here apparent that the Commission has not applied the statute. It has sought to apply only a policy of its own.

The preponderance of freight traffic in this country is transported by railroad. Trade and commerce have long become accustomed to the purchase and sale of goods in quantity units corresponding to the railroad definition of "carload". That definition is expressed in the form of a "carload minimum weight" which, as a rule, is not greater than railroads may transport in single cars and is generally less. With the more recent advent of motor truck carriage of freight the weight carrying capacity of individual motor truck vehicles has been largely influenced by the "trade barrier" laws of individual states which, for the present, remain in force under this court's decision in the case of *Barnwell v. S. C.*, 303 U. S. 177, Congress not yet having acted on the Commission's recommendation to make the matter one of federal law. These laws of particular states (especially east of the Rocky Mountains) so operate that the legal load carrying capacities of the ordinary motor truck vehicles are somewhat (although not now so very much) lower than the minimum weights prescribed by the railroads for shipments in their freight cars.

Motor common carriers and railroads are in position to compete with each other for much of the available freight traffic. Consequently, when effective Federal regulation under the Interstate Commerce Act began in 1936 it was not unnatural that motor carriers should to a very large extent incorporate into their tariffs not only rates for shipping weights that could be loaded into one vehicle but also rates to be applicable to those normal trade units of

quantity, purchase and sale which then moved and still move so largely by railroad under railroad carload rates and minimum weights even though the partial use of a second truck vehicle might often be necessary to accommodate legally the greater quantity. The availability of those motor carrier quantity rates has not been confined in any such way as to penalize shippers should the prescribed minimum weight exceed the legal carrying capacity of individual trucks. That an overflow into a second truck vehicle would often be required was deemed of no concern to shippers because their rate per 100 pounds for the prescribed minimum weight of individual shipments would not be affected and would generally be equal to or nearly equal to the carload rates of the railroads. That the per 100 pound-unit of operating expense of motor carriers would be no *lower* when the shipment called for an overflow than when it did not has been deemed immaterial if the respective rates and resulting earnings of the carriers be within the "zone of reasonableness." There was nothing sacrosanct in the legal weight carrying capacity of the individual truck vehicle so far as concerned the making of quantity rates. Nor could there be any rigidity in that respect because the "state barrier" laws are too variable. As an example, the legal load limit of single truck vehicles in the states of New York and New Jersey exceeds 50,000 pounds; in Pennsylvania the limit is only 25,000 pounds. Consequently the sizes of vehicles owned by the individual trucking companies depend largely upon the proportionate extent of their usual use in one or another of those states either locally or in interstate operations. To try to prescribe motor truck minimum weights on quantity shipments in accordance with these variable state laws would be virtually impossible as to interstate operations. The tariffs would be unreadable because of their complexity and anything resembling uniformity of treatment of shippers at different points of manufacture and markets would be impossible.

No "multiple truck" or "volume" rates, available to only a few, are therefore involved. The question is merely

the legality of a truck minimum weight corresponding to ordinary trade units of purchase and sale, but larger than may at times be legally placed in single vehicles "usually used."

In that broad economic situation the Interstate Commerce Commission, by majority vote, has nevertheless picked out one single fact as a predicate and built upon it a conclusion of illegality only because of its own determined and frankly declared "policy". Because the per 100 pound-unit of carrier operating expense may not be lower when an overflow into a second vehicle is required than when not so required the Commission, in this major test case, very candidly proclaims that as a matter of its own "policy" it will not allow motor carrier minimum weights to exceed the legal load limits of truck vehicles "ordinarily used" even though such minimum weights conform to established trade units of purchase and sale and correspond to those of the railroads.

This is the language used by the Commission's Division 3:

> "The respondents herein have not presented to us a valid reason from the point of view of economy in transportation or otherwise, such as we have found to exist in connection with certain trainload movements, why they should be permitted to establish a minimum weight greater than is physically possible to load in the motor equipment usually used by them, and, in our opinion, no such reason exists. Strictly speaking, the proposed minimum weight of 30,000 pounds is not a truckload minimum weight but rather is a volume minimum weight, which necessitates the use of more than one unit of equipment to load and transport that quantity of linoleum. *We adopt as a policy the condemnation as unreasonable* of a volume minimum weight, unless it is shown clearly that, as a result thereof, motor carriers can handle the traffic at the volume minimum weight at costs per 100 pounds which are less than the costs incurred at a reasonable truckload minimum weight." (Italics supplied.)

The full Commission membership, on review, declared that—

> "For the future *we shall follow the policy* announced in the prior report herein with respect to minimum weights in excess of the loading capacity of the equipment customarily used by the motor carriers." (Italics supplied.)

Time need not here be taken to emphasize even the indefiniteness of this "policy". What may be meant by the phrases "usually used" and "customarily used" in describing its intent, it is at least perfectly clear that the Commission is here reaching out to fashion some sort of legal requirement of its own invention. While couching its ultimate conclusions of illegality in the broad terms of the statute the manifest endeavor of the Commission is to administer not any requirement of the law but only a "policy" of its own making.

As recently declared in substance by Mr. Justice Black, "Congress is the policy maker, not the Commission". Such has been the view of this court since the Commission was created. An order of the Commission was set aside for that reason in *Sou. Pac. R. Co.* v. *I. C. C.*, 219 U. S. 433. In two other cases this court upheld the Commission's orders against the argument that they merely expressed a Commission policy but only because this court concluded that the Commission's action was not of that kind. (*I. C. C.* v. *U. P. R. Co.*, 222 U. S. 541, 554; *U. S.* v. *Ill. Cent. R. Co.*, 263 U. S. 515, 525.)

Here, unlike those other cases, there is no need to search for the real meaning of the Commission's decision. In plain and somewhat bold disregard of this court's attitude on the subject the Commission here, in terms, announced that its conclusion of illegality was arrived at as a matter of "policy" of its own.

That would seem sufficient, even if nothing else appeared to condemn the order as beyond constitutional and statutory authority. Certainly the Commission's frankness of

expression compels the surmise that whatever else it may have said, if anything, to support its formal conclusion, would be only a contributing makeweight.

B. There would be no discrimination in fact or in law as concluded by the Commission.

As if to support its determination of "policy" the full Commission declared the conclusion that there would result "discrimination" between shippers at the same locality under the involved motor carrier rates. The only fact pointed to by it pertinent to that question is that the carrier operating expense per 100 pounds would not be different whether the individual shipping weight should be only enough to load in one truck (20,000 pounds) or a greater load of 30,000 pounds requiring an overflow. Division 3 did not so hold. This was the language used by the full Commission majority in stating its conclusion on this feature of the case: that the involved rates "would give an unjust advantage to shippers of 30,000 pound lots and be unjustly discriminatory to shippers of 20,000 pound lots."

Appellants respectfully urge before this court, as in the court below, that there would be no discrimination in fact and hence there could not be any in law.

The condemned tariffs would be freely open to all. Nothing would be granted to some and denied to others. Any shipper between the involved localities could choose for itself whether to sell or buy and ship at one time 20,000 pounds of linoleum at the 47.5 per cent rate or to sell or buy and ship at one time 30,000 pounds at the 45 per cent rate. The choice could be a continuing one or vary from day to day or even as between different shipments during the same day.

The report of the full Commission majority can be searched in vain for any finding of fact upon which properly to conclude that there would thereby be accorded to any shipper or class of shippers more favorable treatment by the motor carriers than would be accorded any other ship-

per or class of shippers. There is a complete absence of any suggestion, by way of finding or even inference; in the Commission's report, that the availability of the slightly lower 45 per cent basis for 30,000 pound shipments, although openly published for all, would in practical trade economics be confined to a limited few or to those of a particular class. No such finding could have been made since 30,000 pound shipments of linoleum are the normal units of quantity purchase and sale as revealed by the railroad carload rates which apply between the same localities only on shipments of 30,000 pounds.

The case therefore is readily distinguishable from *U. S.* v. *Chicago Heights Trucking Co.*, 310 U. S. 344 and *B. & O.* v. *U. S.* 305 U. S. 507. It is more like the cases of *Penn. Ref. Co.* v. *Western New York & P. R. Co.*, 208 U. S. 208, 221 and *I. C. C.* v. *Diffenbaugh*, 222 U. S. 42.

Appellants here do not question that the mere openness of tariff publication of a shipper choice of practice, with resulting difference of rate may, under some circumstances, nevertheless work out as a forbidden discrimination under the statute. As in *Chicago Heights Trucking Co.* case and *B. & O. Warehouse* case above mentioned it is entirely possible that only a restricted number or class of shippers are in practical economic position to avail a seeming unrestricted choice of practice with resulting difference in rate. That would be a harmful actual discrimination.

But here there is no finding or even inference by the Commission that any such situation would exist. Consequently the present case would seem to be governed by the *Penn Refining* and *Diffenbaugh* decisions of this court. In both of those this court set aside Commission orders in which the conclusion of shipper discrimination was asserted. In both this court concluded otherwise as a matter of law for the reason that in each it appeared that any and all shippers had an equal opportunity, both in form and business economics, to avail either the lower or higher rate as a mere matter of choice dependent upon the chosen shipping practice.

Thus in the *Penn Refining Co.* case the railroad carriers published a single level of rates on petroleum products. If shipments were made thereunder in barrels or other package containers the railroad tariffs provided that the weight of the containers should be charged for along with the weight of the contents. If, however, the shipments were to be made in tank cars the transportation charges would be assessed only upon the net liquid weight. The Commission concluded that the difference in practice caused unjust discrimination between shippers. This court set the Commission's order aside as a matter of law. From the Commission's findings in that case it appeared to this court that the particular reason why the complaining shipper did not elect to ship in tank cars was the fact that it did not possess facilities of its own by means of which to load the oil into tank cars. This court therefore concluded that in such a situation there was merely a voluntary disadvantage to which the shipper had subjected himself. There was no refusal by the railroads to furnish tank cars had they been requested. The language of this court was:

> "Because circumstances existed which prevented the economical use of the tank car by plaintiffs (no demand being made for the use of a tank car) is no ground for finding discrimination in the charge for the weight of the barrel package (such charge being in itself not an unreasonable one) while none is made for the tank containing the oil. It might be different if plaintiffs desired tank cars and defendants failed to furnish them on demand".

In the *Diffenbaugh* case the essential facts were that the railroads in their tariffs authorized an allowance to be paid by them for the elevation of grain. The factual finding of the Commission was that when any shipper of grain happened to be the owner of a grain elevator the payment to it of that tariff allowance for elevation operated as a discrimination in favor of that shipper against other shippers not owning and operating elevators. This court set aside

the Commission's order which had forbidden the continuance of the tariff. In its opinion this court said:

> " . . . the ground of the decision (of the Commission) is that even an honest payment of the bare cost of elevating grain in transit gives an undue advantage if the elevator owner also owns the grain.
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> "We agree with the court below that this decision is erroneous in its conception of the grounds on which, under the statute, an advantage may be pronounced undue, and in its assumption that Congress has left the matter open by merely permissive words. The principle as to advantages is recognized in Penn Ref. Co. *v.* Western New York & P. R. Co. 208 U. S. 208, 221, 52 L. ed. 456, 462, 28 Sup. Ct. Rep. 268. The law does not attempt to equalize fortune, opportunities, or abilities."

Those two decisions are believed applicable here.

A retail drug store may have a legitimate business motive (other than a mere difference in operating expense) in offering to the public one tube of tooth paste for 25c, and two tubes for 40c. Whether the motive be a sound one, and whether or not there be a difference in operating and sales expense, it could hardly be said that such an offer of the druggist would amount to a "discrimination" between his customers. The purchase of the two tubes of tooth paste being readily within the means of nearly all of those who might frequent his store his unrestricted offer could not in the nature of things operate as a discrimination in fact.

Here in the present case, the Commission has erred in believing otherwise. It appears to have considered that if the carrier operating expense *per 100 pounds* should not be different whether 20,000 (a single truckload) or 30,000 pounds (requiring an overflow) be shipped then that the unrestricted carrier offer of a choice of rates dependent upon the quantity shipped would constitute some kind of "discrimination" between shippers. But that is a clear

mixture of thought. It appears to assume that the statutory test of a forbidden "discrimination between shippers" turns upon whether a difference in rates is warranted by a difference in carrier expense. But if in fact any shipper is freely entitled to make the choice and there is no discrimination in fact as between them neither the carriers' operating expense nor any other business motive (right or wrong) is material to the issue of whether there is discrimination under the statute.

If there would exist in the involved tariffs any discrimination in *fact* then the question of carrier operating expense per 100 pounds would arise as a circumstance to be considered in determining whether the discrimination would be justified or not. But where, as here, there would be no discrimination in fact in the sense of denying to some what would be granted to others the absence of a difference in operating expense could not create a *discrimination*, in violation of the statute, which otherwise would not exist.

How seemingly confused the thinking of the Commission was in respect to this matter is evident from the following quotation taken from the majority opinion. It is the only part which speaks of discrimination at all:

> "Under the respondents' proposal, a shipper tendering 20,000 pounds would pay a rate 47.5 percent of first class. If, however, another shipper were to tender 30,000 pounds, the respondents would accord it a rate 45 percent of first class, not because the cost of transporting 30,000 pounds is less than the cost of transporting 20,000 pounds, but because the motor carriers seek to establish rates subject to the same minimum as the rail carriers maintain in connection with their carload rates. The motor carriers contend that rates 47.5 percent of first class and rates 45 percent of first class are reasonable rates. If rates 45 percent of first class are reasonable on any shipments exceeding a truckload, they are reasonable for all truckload shipments unless, as in the *Molasses case*, the cost of transporting quantities exceeding a truckload is less than that of transporting a truckload. In

> the absence of such a showing of dissimilar circumstances and conditions, the rates 45 percent of first class should not be accorded to one class of shippers, those which tender 30,000 pounds at a time, and denied to another class of shippers, those tendering 20,000 pounds at a time.
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> * * * *
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> "We further find that the proposed rates, minimum 30,000 pounds, would give an unjust advantage to shippers of 30,000-pound lots and be unjustly discriminatory to shippers of 20,000-pound lots."

The Commission's reference there to different "classes of shippers" will be observed. That use of language, standing alone, would suggest that elsewhere in the opinion there may have been a finding that there are two classes of shippers, i. e., those whose business enable shipments of 30,000 pounds and an entirely different group who are compelled, for some inherent economic reason, to ship only 20,000 pounds at a time. But no such other finding was made nor could have been made on the record. In speaking of "classes of shippers" the language employed goes on to define the Commission's meaning as "those who tender" the one shipping weight or the other "at one time"! There is not here attributed to the Commission intentional adroitness designed to mislead. But when analyzed the quoted language, stripped of superfluous verbiage, amounts to nothing more than the palpable error of saying that a "discrimination between shippers" can exist although each and every one is freely and economically entitled to choose what weight to ship "at one time" and thereby obtain either the lower or the higher rate as may be desired, dependent only upon the quantity which each is at full liberty to "tender".

It is therefore respectfully submitted that as a matter of law the Commission's conclusion with respect to the question of discrimination was erroneous.

C. The conclusion of "unreasonableness" was legally arbitrary because it did not rationally follow from any factual finding made.

It was determined by the Commission that the 47.5 per cent rate basis applicable to individual shipments weighing between 20,000 and 30,000 pounds would not be unreasonably high nor produce excessive earnings to the carriers. It was also determined by the Commission that the 45 per cent basis applicable to individual shipments weighing 30,000 pounds or more would not be unreasonably low nor unreasonably high or cause the resulting earnings of the motor carriers therefrom to be either too low or two high. Both rates with their respective minimum weights were, apparently, deemed to lie comfortably within the "zone of reasonableness". (See *Milwaukee Coal Case*, 294 U. S. 299; *U. S.* v. *Ill. Cent. R. Co.*, 263 U. S. 515; *Keogh* v. *C. & N. W. R. Co.*, 260 U. S. 156; *Skinner & Eddy* v. *U. S.*, 249 U. S. 557; *American Express* v. *Caldwell*, 244 U. S. 61.)

There was no determination that the 45 per cent basis, applicable to shipments of 30,000 pounds, would consist of "multiple truck" rates in the sense that the availability of those rates would in practical effect be confined to only a few or a particular class of shippers. There was no question that 30,000 pound shipments of linoleum would be comfortably within the established trade units of purchase, sale and shipment of that commodity, the standard railroad minimum weight on the same commodity being 30,000 pounds. There was no determination that any penalty in the way of rates or service would be imposed upon shippers who may choose to avail themselves of the 45 per cent rates even though because of particular state barrier laws it would often be required that the motor carriers, to accomodate shipments of 30,000 pounds, would put an overflow of a few thousand pounds into a second truck vehicle. It was not questioned by the Commission that normally the remainder of the available space in the second truck vehicles

would be utilized by the motor carriers for the transportation of other shipments of the same or a different kind.

Nevertheless the Commission majority concluded, as a matter of "policy" of its own, that it would condemn as "unreasonable" any minimum weight for motor carriage shipment calling for a quantity which would to any extent exceed the legal load carrying capacity of single motor truck vehicles "usually used", unless it should appear (as it here did not) that the unit operating expense of the motor carriers per 100 pounds would be lower for the larger shipments calling for the overflow.

That conclusion of "policy", in the belief of appellants, was in law arbitrary. It was so described by one of the three Commission dissenters. As the 45 per cent basis of rates, for shipments of 30,000 pounds, was not determined to produce charges or earnings which in themselves would be unjustly and unreasonably high or low there was an inherent contradiction in the conclusion that nevertheless the required individual shipping weight of 30,000 pounds would in itself be unreasonable merely because that quantity may not legally be placed in a single vehicle.

There is no rational relation between the weight that may be legally loaded in one truck and the justness and reasonableness of a prescribed minimum shipping weight which shall govern the application of a particular rate per 100 pounds. It is of no concern to shippers, and ought not to be to the Commission, whether the required minimum shipping weight can be put legally into one truck vehicle or would require the partial use of a second one. The reasonableness of a prescribed weight, standing alone, should not be tested by its relation to the mere physical legal load limit of a single truck vehicle if nothing else points to the unreasonableness of the minimum weight requirement itself.

The case would be wholly different if the required minimum of 30,000 pounds was not, in practical economics, readily available to all. It would be different if the carrier

earnings, for shipments of 30,000 pounds at 45 per cent, were unreasonably low or unreasonably high. It might even be different if the 47.5 per cent basis, offered for use by those shippers wishing to tender only 20,000 pounds, were deemed unreasonably high or would produce unreasonably high earnings. None of those conditions here exist.

Both the 45 per cent and the 47.5 per cent basis, with their respective minimum weights, evidently are regarded by the Commission as within the "zone of reasonableness" as far as earnings are concerned. If the prescription of a minimum weight of 30,000 pounds be thought of as a "practice affecting rates" and its reasonableness be tested independently of carrier earnings the inquiry would have to concern other things and call for other findings than those here made by the Commission. Had the Commission laid aside any aspect of the case other than the reasonableness of the "practice" of making available the 45 per cent rates only upon condition that 30,000 pounds be shipped at one time the reasonableness of the "practice" would depend upon such matters as the general convenience of the shipping public in view of its established trade customs and whether or not any rate penalty would be imposed upon shippers if the required minimum weight exceeded the legal load carrying capacity of single vehicles. But the Commission made no determinations adverse to the practice on those grounds and could not have on the record before it. Instead it concluded, in substance, that if reasonably a carrier can "afford" the lower of two rates within a zone of reasonableness, although made for competitive reasons, it should remove the condition attached to its availability and elect to charge either something higher without the condition or to charge the lower rate without the condition.

The foregoing technical analysis, although correct, tends to obscure what was the real thinking of the Commission. Actually, it put its decision of "policy" on a broader and more candidly stated basis. It pointed to the fact that in the history of its regulation of railroads it

long had felt that quantity rates for shipment by railroad should not be governed by minimum weights greater than the ordinary commercial units of purchase and sale such as a single carload. (*Providence Coal Co.* v. *P. & W. R. Co.*, 1 I. C. R. (not I. C. C.) 163; *Thurber Case*, 2 I. C. C. 742; *Anaconda Copper Mining Co.* v. *C. & E. R. Co.*, 19 I. C. C. 592; *American Round Bale Press Co.* v. *A. T. & S. F. Ry. Co.*, 32 I. C. C. 458; *Re Molasses Case*, 235 I. C. C. 485; *D. L. & W. R. Co.* v. *U. S.*, 220 U. S. 235). For no apparent reason in law or compelling economics the Commission here has therefore resolved merely as a matter of policy of its own similarly to confine motor carriers to the making of their quantity rates which, in respect to their prescribed minimum weights, would be available to any shipments capable of being loaded into single truck vehicles "usually used". It does not say just why that would be the only lawful course in the case of trucks. Its purpose apparently is merely to transplant to the motor carrier industry a broad rule of action heretofore applied to railroads *despite the utter lack of any comparable reason for doing so.* When denial of the privilege of making railroad carload rates dependent upon shipping quantities greater than single carloads was developed by the Commission over the years the typical and leading Commission decisions above cited show the reason for it. That reason simply was that, with evident rationality, the Commission considered that it would be unreasonable and preferential for railroads to offer quantity rates greater than the customary units of commercial transaction would call for, they being usually a single railroad carload. Otherwise only a few or a restricted class of shippers would be in position to avail the quantity rates. It is for that reason that "train load" rates in general have been forbidden because they involved "multiple car" shipments.

Here, however, while speaking of the 45 per cent motor carrier rates as if in the nature of "volume rates" because to some extent exceeding single truck loads the Commis-

sion has ignored completely the fact that the minimum weight of 30,000 pounds is comfortably within the range of ordinary commercial unit of sale and shipment and would call for an overflow of only a few thousand pounds. Because the carrying capacity of railroad freight cars and the legal carrying capacity of motor trucks are not the same the Commission now seeks, as a matter of policy of its own, to apply to motor carriers (without a similar reason for doing so) an arbitrary rule that the truck minimum weights shall not exceed the legal carrying capacities of individual trucks "customarily used".

In that respect its position is not confined to cases in which, as here, the motor carriers may offer a choice of two quantity rates, i. e., the one to be governed by a minimum corresponding to single truck loads, and the other, slightly lower, calling for an overflow. In its subsequent interpretations of the meaning of its decision in the present case it considers the same rule applicable even though only one quantity rate shall be provided (See as typical *Cigarette and Tobacco*, 42 M. C. C. 1; *Re Coffee from Jacksonville*, 34 M. C. C. 625).

It is therefore respectfully urged that this court invalidate the order of the Commission in respect to the conclusion of unreasonableness on the ground that it is legally arbitrary, that it is inherently contradictory, and that the conclusion of unreasonableness of the minimum weight of 30,000 pounds does not rationally follow from any facts determined and declared by the Commission.

D. In rejecting the defense of competition between motor and rail carriers the Commission made no findings whatsoever and acknowledged arbitrariness.

Beneath the whole situation of fact which this case presents it is the predominating element of competition between motor and rail carriers. It plainly appears in the

record before the Commission and is accepted by the Commission itself that here the motor carriers seek to establish two quantity rates each of which would be within the zone of reasonableness. Those spoken of as 47.5 per cent of first class would be applicable to individual shipments that may be tendered in quantities of not less than 20,000 pounds (enough to fill one truck) or more than 20,000 pounds up to but not including 30,000 pounds (calling for an overflow). Those rates and the prescribed *minimum* weight were determined by the Commission to be just and reasonable in all respects even though applicable to shipments weighing considerably more than 20,000 pounds and more than could be legally loaded into a single truck. In addition the motor carriers, in order to compete fairly with the railroads, seek to establish slightly lower rates based upon 45 per cent of first class and to condition them upon the requirement that the *minimum* shipping weight shall be 30,000 pounds. Those rates, too, were determined by the Commission not to be unjustly or unreasonably low or high and there was no conclusion that such rates, in association with the 30,000 pound minimum, would produce carrier earnings too low or too high.

That the carrier operating expense per unit of 100 pounds was not shown to be different is believed by the motor carriers to be immaterial (in the absence of an actual discrimination between shippers) for the reason that the lower rate and higher minimum weight involved a voluntarily lowering of profits in order to compete with the railroad car load rates. That the carrier operating expense would be substantially lower under either the 30,000 or 20,000 pound minimum than on smaller shipments weighing less than 20,000 pounds (on which 70 percent of first class would be charged) was not questioned by the Commission. As both the 45 and 47.5 percent rates per 100 pounds would lie within the zone of reasonableness even if there were to be an actual discrimination between shippers (contrary to the fact) the asserted right thus to meet railroad competi-

tion at the 45 percent rates is believed to have been fully sustained by the recent decision of this court in *Barringer* v. *U. S.*, No. 520, October Term, 1942, regardless of the relative expense of handling the two shipping weights. Carrier expense had nothing to do with the decision of this court in that case.

Appellants did not take before the Commission or the court below such a position as that the mere fact of competition invariably and under all conceivable circumstances is a defense, under the prevailing Interstate Commerce Act, where the legality of rates may be in question. But it has heretofore been understood to be the law that before competition may be *rejected* as a defense there must be ascertained and declared essential facts taking the case out of the general rule that competition is favored by the statute and is ordinarily a complete defense.

Here the Commission, in rejecting the defense of competition, did so for no stated reason whatsoever and without any finding of fact upon which this court itself could be disposed to sustain the Commission's action. Instead the Commission put itself squarely upon the proposition (erroneously of course) that the decision of this court in *U. S.* v. *Ill. Cent. R. Co.*, 263 U. S. 515, allows to it the right to accept or reject competition at will. Seemingly the thought is that recognition or rejection of competition by the Commission is something which lies with it solely as a matter of its own "policy". This is the language, and all the language, it used in respect to this very important feature of the litigation:

> "The motor carriers contend that the existence of the competition of the rail carriers which maintain rates 42.5 percent of first class, minimum 30,000 pounds, constitutes a dissimilarity in circumstances and conditions sufficient to prevent us from finding that unjust discrimination results from the maintenance of lower rates on 30,000-pound than on 20,000-pound shipments. The extent to which competition between carriers may render discrimination and

prejudice not unlawful must be decided upon the facts in each case. In *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, the United States Supreme Court held that the innocent character of a discrimination is not established, as a matter of law, by showing that the preferential rate is given to others to develop traffic on the carrier's own lines or to secure competitive traffic. The Court further held that these are factors to be considered by the Commission; but they do not preclude a finding that the discrimination practiced is unjust.

The existence of competition between motor and rail carriers does not relieve either type of carrier from according shippers reasonable rates, nor does it render lawful unlimited discriminations and prejudices. The competition between rail and motor carriers for linoleum traffic does not constitute such dissimilarity in circumstances and conditions as to render legal the proposed discrimination."

It will be noted from this quotation that the Commission gives no reason whatsoever why, in the particular case, the defense of competition was rejected. It simply states that this court's decision in the *Illinois Central* case makes the matter of competition only a fact to be considered by it, that competition does not relieve regulated carriers from the duty of according reasonable rates, or render lawful "unlimited" discriminations and prejudices as a matter of right. If it be granted that those generalities do not too greatly depart from an accurate statement of the law their mere statement however left undisposed of the question whether in this particular case should competition be recognized or not, and if not then why not. But as to that decisive question nothing more was said by the Commission than that "the competition between rail and motor carriers for linoleum traffic does not constitute such a dissimilarity in circumstance and conditions as to render legal the proposed discrimination." Absolutely no reason whatsoever is given for that determination of the Commission. It betrays the sheerest of arbitrary action not sustainable by any expression ever uttered by this court.

Before 1920, when the Commission first acquired the power to alleviate the stresses of excessive competition through the prescription of minimum rates, this court had frequently dealt with competition as a defense to claims of illegality of rates:

I. C. C. v. *B. & O. R. Co.*, 145 U. S. 263;
C., N. O. & T. P. Ry. Co. v. *I. C. C.*, 162 U. S. 184;
T. P. R. Co. v. *I. C. C.*, 162 U. S. 197;
L. & N. R. Co. v. *Behlmer*, 175 U. S. 648;
E. T., V. & G. R. Co. v. *I. C. C.*, 181 U. S. 1;
Intermountain Rate Case, 234 U. S. 476.

While then leaving to the Commission a modicum of administrative authority in respect to the matter, *under exceptional conditions*, those decisions reveal that this court then considered competition a very significant and as a rule dominating fact under the statute.

It was in 1920 that Congress reversed the former policy of regulating carriers in merely a restrictive manner. In that year it greatly amended the Interstate Commerce Act to the end of promoting the welfare of transportation agencies themselves. It was said by this court in the decision in *Dayton* v. *Goose Creek Ry. Co.*, 263 U. S. 456, that the amended statute of 1920 "marked a new departure". It moderated the effect of the anti-trust laws upon consolidations and pooling; a rule of rate making was prescribed based upon the general average of operating results in wide rate-making territories; it enlarged the Commission control of divisions of joint through rates so as to strengthen the weaker lines; and it restrained the excesses of competitive strife among carriers by allowing to the Commission authority to prescribe minimum rates.

In time (1935) motor carriers were brought under regulation in Part II of the Act; after that domestic water carriers were embraced in Part III of the Act (1940); and still later freight forwarders were brought in by Part IV.

For the purpose of adjusting the competitive relations between these different agencies of transportation Congress in 1940 adopted an over-all transportation policy which by its terms was made a rule of action in construing all parts of the enlarged statute (U. S. Code Title 49, Secs. 27, 301, and 901 Notes, 54 Stat. L. 899). In its entirety that declared "National Transportation Policy" sought to effectuate a healthy balance between the adequate protection of shipper interests and at the same time the upbuilding of a sound domestic transportation industry in this country. It was in terms declared among other things to be the policy of Congress to provide for "impartial regulation of all modes of transportation to be so administered as to recognize and preserve the inherent advantages of each".* In respect to the establishment and maintenance of reasonable charges, without unjust discriminations and preferences, it was declared to be one of the objects of the statute to prevent "unfair or destructive competitive practices".

Congress did not thereby say that the statute was designed to prevent competition at all or that competition would not be a weighty consideration in the administration of the entire Act. It intentionally allowed a free play to the forces of fair and constructive competition; it denounced only "unfair or destructive competitive practices".

This court's recent decision in the *Barringer* case confirms in all respects that broad conception of the meaning of the statute in relation to the legal effects of competition. There an order of the Commission was sustained which had upheld the validity of an actual discrimination practiced by railroads for the reason that the discrimination rested upon the ascertained element of competition between the railroads and motor carriers. No findings had there been made by the Commission which seemed sufficient to warrant the setting of that order aside on the ground that competi-

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* No question of "inherent advantages" was dealt with by the Commission in this case.

tion had been improperly recognized as a defense. Nothing "destructive" in the way of competitive excess was there determined to exist, and for that reason the discrimination was allowed to stand.

The language of the "National Transportation Policy" concerning the degree of legal importance to be attached to competition was itself derived from this court's own prior decisions in *U. S.* v. *Ill. Cent. R. Co.*, 263 U. S. 515; *Mississippi Valley Barge Case*, 292 U. S. 282; and *Milwaukee Coal Case*, 294, U. S. 299. *Scandrett* v. *U. S.*, 312 U. S. 661, affirming per curiam 32 Fed. Supp. 995. Out of this court's decisions in those cases there is to be gathered this understanding of the previously existing law applicable to this subject: competition is a dominating defense circumstance unless it be excessive in the production of unduly low rates below service costs, unless the competitive rates would "menace the integrity" of transportation as a whole, unless it be malicious and designed to destroy competitors, or unless it should produce discrimination between shippers or localities that would otherwise be undue in their extent and harmful in their consequences. As successively motor carriers and water carriers, and then freight forwarders came within the scope of the statute Congress determined to make applicable to them too and to their competitive relations with each other and with railroads the same broad conceptions as to the legal effects of competition by boiling all of it down to the simple expression contained in the 1940 "National Transportation Policy". Having therein declared that the Congressional intent is directed to the avoidance of "unfair or destructive competitive practices", there was left ample room for the free play of competitive forces that may not be determined "unfair or destructive".

Sound considerations of public policy would quite naturally lead to that sort of comprehensive line of demarcation. It serves best the interests of both shippers and carriers and hence of the nation itself. In the nature of things it would be the Congressional intent to promote, not to discourage, competition that is fair and not destructive.

But wherein can room be found in these conceptions of the statute for the Commission's asserted power in this case. In here rejecting the defense of competition it made no findings of malicious or excessive competitive zeal, menacing effect upon competitors, unfair and destructive competition, or hurtful discriminations of an actual kind greater than the competition itself would warrant. Instead the Commission contented itself with the extreme assumption that it possesses the right to reject or recognize the defense of competition with no statement of reason therefor as if the arbitrary power to do so was intended by this court to be upheld in *U. S.* v. *Ill. Cent. R. Co.*, 263 U. S. 515. The right to pursue its own "policy" is all that seems to be claimed.

That is not and could not be the law. There is no place in our constitutional scheme of government for the possession of arbitrary power of that kind by any administrative agency of government.

Clearly, as stated, Congress favors, in accordance with its own declared national transportation policy, competition of a healthy sort; it discourages destructive and unfair competition. It undoubtedly allows to the Interstate Commerce Commission a wide field of administrative action in determining and setting forth, as a body of experts, which side of the line a particular situation falls and why. It did not, however, accord that administrative agency the right to do as it may merely please because of a "policy" of its own and to give no explanation whatsoever for its conclusion on the defense of competition in a particular case.

For that reason the order here involved should be annulled and set aside.

E. The Commission made no findings concerning efficiency of operation and no question of the sort was involved.

Little need be said here concerning this topic. In its report the Commission majority alluded to Sec. 216 (i) of the Interstate Commerce Act (U. S. Code Title 49, Sec. 316 (i)) which among other things speaks of the "need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service." Following that quotation the Commission calculated the gross truck-mile earnings under the involved rates in accordance with various assumed different loadings of linoleum. Among them was one in which it was observed that if only 8,000 pounds were put into a second vehicle and no other freight were to be loaded into it the truck mile earnings on that 8,000 pounds would be only 6.9 cents. Then this was said:

> "In both of the examples given the carrier would have space available in the second truck in which less than truckload shipments could be transported, but it is doubtful whether less than truckload shipments from Boston to Dodge City or between intermediate points always would be available".

It is not at all certain that Section 216 (i) of the Interstate Commerce Act, when speaking of reasonable truck rates being those which would enable "adequate and efficient transportation at the lowest cost consistent with the furnishing of such service", has any reference at all to particular rates. It would seem to relate only to the rate structure as a whole having in mind that the paramount object was the assurance of "adequate and efficient transportation service in the public interest". While the Commission is admonished by the statute to keep motor carrier rates as a whole at the lowest level consistent with the accomplishment of that national policy it is difficult to find wherein

there would have been any room or occasion for its application in this particular case as the basis for an order. It is only "rates" that are spoken of. If, to meet competition, and thereby aid themselves, the motor carriers depress somewhat certain of their rate levels on quantity freight shipments without impairing the adequacy and efficiency of their general operations, and in that sense they could "afford" to do so, it would not seem that to attach to the availability of such competitive rates the requirement of a minimum shipping weight calling for an overflow into a second vehicle could be deemed unlawful under the quoted language of Section 216. Because the operating expense per 100 pounds may not be less when an overflow is required than when it is not would hardly give to the Commission the power to compel the lowest of the competitive rates to be made available on shipments of the smaller weight only because it could be "afforded". Within the zone of reasonableness the carriers should be left free to make higher and more normally profitable rates for the accommodation of those smaller weight shipments of between 20,000 and 30,000 pounds which, if not exceeding 22,000 pounds, could be placed in a single vehicle. To require motor carriers to drag all their normal rates to the level of lower ones which competition requires would only defeat instead of serve the Congressional purpose concerning adequate, sound, and efficient transportation.

But a more cogent consideration is that the Commission made no "findings" appropriate to an involved subject of this kind. There was no determination by it that inefficiency of operation would lie in what the motor carriers here seek to do. Nor was there anything resembling a categorical determination that the 45 per cent competitive rate basis on quantity shipments should be made available on any shipments weighing 20,000 pounds *or more* because to do so would produce the lowest transportation cost consistent with adequate and efficient transportation. Had the intention of the Commission been to put its decision upon a

ground of that sort much more would have been said and would have had to be said to support a valid order, even if one could have been made on any such theory of the law. A construction of the statute allowing the Commission a sweeping power of that sort would enable it to reach down into so much of the details of business management of the carriers as to make them virtually incapable of private operation. That construction would not, therefore, be warranted even if the question should at any future time come before this court.

On the record before it the Commission had no basis for an assumption that the overflow quantities into second vehicles would not ordinarily be mixed with other freight shipments which would pay their own separate and additional rates; nor did it do so. For it to express, therefore, as it did, "doubt" that that always would be so was not something which the record itself dealt with and at the most was a surmise which, even if true, would represent only the extreme and not the ordinary experience in motor carriage.

F. The Commission here sought to put the motor carriers into a straight jacket and to accomplish unlawfully by indirection an allocation of traffic.

It is not here complained that state regulatory laws, sometimes punitive, limit the sizes of motor truck vehicles and their legal loadings on the public highways. That appropriate limitations upon the sizes of motor trucks are required for the public safety and convenience, whether to be imposed by state or Federal authorities, is not here a matter in issue. This case concerns only the reasonableness of certain motor carrier freight rates and the minimum shipping weights which shall govern their application to particular transactions. Whether small or large individual shipments were to be made has nothing to do with enlarge-

ment of the legal load carrying limits of individual truck vehicles. All that the motor carriers here seek to do is, while maintaining quantity rates not unreasonably high in themselves to be governed by minimum shipping weights of 20,000 pounds, to offer at the same time slightly lower rates like those of the railroads on minimum shipping weights of 30,000 pounds, both to be within the zone of reasonableness, even though the larger quantity may require an overflow because of legal load limits of single vehicles.

This the Commission seeks to prevent. It wrongly supposes that the controlling test of legality is only the matter of carrier operating expense per 100-pound units. It seeks to make "cost of service" the dominant and all-controlling circumstance. It would ignore entirely, because of its own policy, the free play of fair competition. It seeks to fashion motor carrier and railroad rate structures in their relation to each other only on the basis of their respective unit operating costs, with consequent allocation of traffic to the respective forms of transportation in accordance with what the cost calculations might show.

The statute does not have that effect or endow the Commission with any such authority. This court in *Louisiana Public Service Commission* v. *Texas & N. O. R. Co.*, 284 U. S. 125, said:

> "While in the making of reasonable rates all the material facts are to be regarded, it has never been deemed necessary or practicable—if indeed it is at all possible—to ascertain in advance the cost to carriers of each of the various elements embraced in the transportation service. The act does not require any such determination."

The *Milwaukee Coal* case, supra, could not have been decided as it was if the relationship of rates on competitive traffic as between different carriers had to be measured exclusively by their comparative service costs on particular movements of freight. The *Mississippi Valley Barge* case,

supra, would not likely have been decided in the way it was had the railroads there involved been prevented by law from reducing somewhat on the heavier shipments their normal rates within reasonable and honestly competitive limits because of their desire to participate with the Mississippi River barge lines in available competitive traffic. The recent decision in the *Barringer* case turned on competition, not comparative service costs.

Congress would not likely have intended otherwise. In forbidding "unfair and competitive practices" it did not mean to deny the privilege of competition in rates at all. It did not say that only relative operating expenses would be the test of legality of transportation rates in this country. It did not say that if carriers can "afford" in particular instances to lower some of their rates so as to compete fairly the penalty of doing so would be to drag down their normal and more profitable but still reasonable non-competitive rates. It did not seek to introduce in this country a scheme for the allocation of freight traffic to the different forms of transportation agencies in such way as to put each into a vacuum and deprive the shipping public of healthy competition between them.

The Commission's action in the present case, taken as a result of its own declared "policy", clearly reveals an attempt on its part to fashion a motor carrier rate structure too rigidly related to comparative service costs as a means of dictating the fields of traffic which may be sought. True enough it seemingly would allow to motor carriers the maintenance of their 45 per cent rate basis, viewed merely as rates per 100 pounds; but it would require them to be made available, because it could be "afforded", to the exclusion of the more normal and slightly higher rates on smaller weight shipments and in disregard of the fact that railroad 45 per cent rates would apply only to the larger shipments. Well did the Commission know that those drastic limitations sought to be imposed upon the availability of the 45 per cent

rates would amply suffice to discourage their establishment as a carrier policy of rate-making to any comprehensive degree.

CONCLUSION

It is respectfully urged that the order of the Commission be set aside and its continued enforcement enjoined.

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